

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 30, 2007

**AARON BURTON v. HOWARD CARLTON, Warden**

**Appeal from the Criminal Court for Johnson County**  
**No. 5043     Lynn W. Brown, Judge**

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**No. E2007-01319-CCA-R3-HC - Filed December 28, 2007**

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The Petitioner, Aaron Burton, appeals the Johnson County Criminal Court's summary dismissal of his petition for a writ of habeas corpus. In 1997, the Petitioner pled guilty to second degree murder and received a sixteen-year sentence. The main focus of the Petitioner's argument is that his judgment is void because at the time of his conviction, second degree murder was not a lesser-included offense of felony murder. In two prior decisions of this Court, we addressed this precise claim of the Petitioner and determined it to be without merit. We affirm the order summarily dismissing the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Aaron Burton, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee and Mark Fulks, Assistant Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

This is the Petitioner's fifth time before this Court since he pled guilty to second degree murder on December 3, 1997, and received a sentence of sixteen years as a Range I, standard offender. The procedural history has been succinctly set out by this Court in four prior decisions. See Aaron Burton v. State, No. E1999-01616-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 1006 (Tenn. Crim. App., Knoxville, Mar. 31, 2000) (order) (the Petitioner sought post-conviction relief alleging ineffective assistance of counsel), perm. to appeal denied, (Tenn. Nov. 6, 2000); Aaron Burton v. State, No. E2000-01403-CCA-R3-PC, slip op. (Tenn. Crim. App., Knoxville, Oct. 22, 2001) (order) (the Petitioner filed a "petition to correct or modify void illegal judgment," arguing

that “his judgment of conviction was void because he was permitted to plead guilty to an offense which is not a lesser-included offense of felony murder”), perm. to appeal dismissed, (Tenn. Jan. 28, 2002); Aaron Burton v. State, E2001-02670-CCA-R3-PC, 2002 WL 500941 (Tenn. Crim. App., Knoxville, Apr. 4, 2002) (the Petitioner filed a “Petition for Post-Conviction Relief and/or to Reopen,” contending he had “new evidence to prove his innocence,” consisting of “sworn statements from both alleged co-defendants . . . stating that they lied to police and that Petitioner had nothing to do with this case and was not involved”); Aaron T. Burton v. Virginia Lewis, Warden, E2004-02380-CCA-R3-HC, 2005 WL 2255433 (Tenn. Crim. App., Knoxville, Sept. 15, 2005) (memorandum opinion) (the Petitioner filed a habeas corpus petition arguing, among other things, that “the conviction offense is not a lesser-included offense of the offense for which he was originally charged” and that “his guilty plea to second degree murder was not knowing and voluntary”), perm. to appeal denied, (Tenn. Jan. 30, 2006).

On March 5, 2007, the Petitioner filed the instant petition for habeas corpus relief. The crux of his argument is once again that his judgment is void because he was permitted to plead guilty to second degree murder, which was not a lesser-included offense of felony murder at the time of his conviction. He further contends that his plea was not knowing and voluntary, arguing that the trial court, the prosecutor, and defense counsel led him “to believe that second degree murder was a lesser included offense of first degree felony murder . . . without second degree murder being an amended charge and/or amendment of the indictment.”

The Petitioner acknowledges that this is his third<sup>1</sup> application for habeas corpus relief but contends that his claim for relief “has not been previously ruled upon and/or was improperly ruled upon by the Tennessee Court by a misapplication of the law, and an unreasonable application of the law.” He contends that, at the time of conviction in 1997, Tennessee jurisprudence did not consider second degree murder to be a lesser-included offense of felony murder and, therefore, this Court erred in its prior decisions by applying State v. Ely, 48 S.W.3d 710 (Tenn. 2001), retroactively to his conviction.

The State filed a motion for summary dismissal, seeking dismissal of the petition on the basis that the Petitioner’s claim had been litigated twice and both decisions were rendered against the Petitioner. The trial court granted the State’s motion and entered an order of dismissal on April 20, 2007. It is from this determination that the Petitioner now appeals.

### ANALYSIS

The determination of whether to grant habeas corpus relief is a question of law and our review is de novo. See State v. Summers, 212 S.W.3d 251, 262 (Tenn. 2007). The Tennessee Constitution guarantees a convicted criminal defendant the right to seek habeas corpus relief. See Tenn. Const. art. I, § 15. However, the grounds upon which habeas corpus relief will be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A petition for habeas corpus relief may only be granted when the judgment is shown to be void, rather than merely voidable. Id. A

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<sup>1</sup> The “petition to correct or modify void illegal judgment” was construed as seeking habeas corpus relief.

judgment is void only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that the convicting court was without jurisdiction or authority to sentence a defendant or that a defendant's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). On the other hand, a voidable judgment or sentence is one which is facially valid and which requires evidence beyond the face of the judgment or the record of the proceedings to establish its invalidity. Taylor, 995 S.W.2d at 83. A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005). Moreover, it is permissible for a court to summarily dismiss a habeas corpus petition, without the appointment of counsel and without an evidentiary hearing, if there is nothing on the face of the record or judgment to indicate that the convictions or sentences addressed therein are void. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

The Petitioner's argument—the judgment of conviction is void because the conviction offense (second degree murder) is not a lesser-included offense of the offense for which he was originally charged (felony murder)—has previously been addressed by this Court in two prior opinions. The Petitioner also asserts again that his plea to second degree murder was not knowing and voluntary. These issues have already been addressed. See Burton, No. E2000-01403-CCA-R3-PC, slip op.; Burton, 2005 WL 2255433.

On appeal from the Petitioner's "petition to correct or modify void illegal judgment," this Court concluded that the Petitioner had no claim for habeas corpus relief on the grounds of a void judgment:

In this case, the [P]etitioner challenges the jurisdiction of the trial court to enter judgment based on the [P]etitioner's guilty plea to an offense which he claims is not a lesser-included offense of the conviction offense and for which he was not therefore charged. . . . In State v. Ely and Bowers, 48 S.W.3d 710, 721-22 (Tenn. 2001), however, our supreme court held that "the offenses of second degree murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of felony murder" under the applicable test adopted in State v. Burns, 6 S.W.3d 453 (Tenn. 1999). Furthermore, second degree is axiomatically a lesser-included offense of premeditated first degree murder, an offense that was also charged in the indictment.

Burton, No. E2000-01403-CCA-R3-PC, slip op. at 2. This Court also affirmed the denial of habeas corpus relief in 2005, concluding as follows:

[T]he judgment, without specific reference to either count of the indictment, reflects that the [P]etitioner was indicted for first degree murder and was convicted pursuant to his guilty plea for second degree murder. There being no indication from the face of the judgment that the trial court lacked jurisdiction to sentence the [P]etitioner upon his guilty plea to second degree murder, the judgment itself is facially valid. . . . Next, the [P]etitioner's argument of an involuntary and unknowing guilty plea

is not a cognizable claim for habeas corpus relief because, even if proven, it would render the judgment merely voidable rather than void.

Burton, 2005 WL 2255433, at \*2.

As previously noted, “the judgment, without specific reference to either count of the indictment, reflects that the [P]etitioner was indicted for first degree murder and was convicted pursuant to his guilty plea for second degree murder.” Burton, 2005 WL 2255433, at \*2. “Second degree is axiomatically a lesser-included offense of premeditated first degree murder, an offense that was also charged in the indictment.” Burton, No. E2000-01403-CCA-R3-PC, slip op. at 2. Regarding felony murder, at the time of the Petitioner’s guilty plea in December of 1997, State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996), was the controlling authority on lesser-included (and lesser-grade) offenses. See State v. Wiley, 183 S.W.3d 317, 326 (Tenn. 2006). Our supreme court has stated that second degree murder was a lesser offense of felony murder under Trusty. Trusty, 919 S.W.2d at 310; see also Wiley, 183 S.W.3d at 327. Finally, “the [P]etitioner’s argument of an involuntary and unknowing guilty plea is not a cognizable claim for habeas corpus relief because, even if proven, it would render the judgment merely voidable rather than void.” Burton, 2005 WL 2255433, at \*2.

The Petitioner’s judgments of conviction are valid upon their face. The sentence of confinement has not expired. The Petitioner’s argument has been previously decided, and we concur with the two previous decisions of this Court that the Petitioner’s issues have no merit.

The Petitioner also raises as error that “the habeas corpus court erred in failing to rule upon [his] motion to proceed in forma pauperis and indigent status[.]” In its order of dismissal, the habeas corpus court made no finding regarding indigency, concluding that “the pauper’s oath and affirmation [was] not sufficient to make” such a finding and, therefore, taxed costs to the Petitioner. Attached to the petition was only the motion to proceed in forma pauperis and the inmate trust account statement. The Petitioner filed the petition knowingly and voluntarily and failed to file the required accompanying documents pursuant to Tennessee Code Annotated sections 41-21-801 to-816 and Rule 13, Tennessee Rules of the Supreme Court. The habeas corpus court did not err.

### CONCLUSION

The Petitioner has failed to present any evidence that his sentence has expired or that his conviction is void. Accordingly, the judgment of the habeas corpus court summarily dismissing the petition for a writ of habeas corpus is affirmed.

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DAVID H. WELLES, JUDGE